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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBERT BOULE,

Plaintiff,

v.

ERIK EGBERT, *et al.*,

Defendants.

Case No. C17-0106 RSM

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This matter comes before the Court on Defendant's Motion for Summary Judgment. Dkts. #102 (filed under seal) and #107.¹ Defendant seeks the dismissal of all claims made against him as a matter of law. *Id.* Plaintiff agrees that some claims may be dismissed, but argues that disputes as to material questions of fact preclude summary judgment on his First Amendment retaliation claim. Dkts. #135 (filed under seal) and #140. For the reasons set forth below, the Court disagrees with Plaintiff and GRANTS Defendant's motion.

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II. BACKGROUND

¹ The Court previously resolved the portion of Defendant Egbert's motion regarding Plaintiff's Fourth Amendment claim. Dkt. #154. In addition, Defendant had moved for summary judgment on his Anti-SLAPP counterclaim, but has since voluntarily dismissed that claim. Dkt. #151. Thus, this Order addresses only the remaining portions of the motion.

1 Plaintiff initially filed this action on January 5, 2017. Dkt. #1. He filed an
2 Amended Complaint on September 6, 2017. Dkt. #22. The allegations arise from an
3 interaction with Defendant Erik Egbert, a United States Customs and Border Protection
4 (“CBP”) Officer, on March 20, 2014. *Id.*

6 Plaintiff resides in a house immediately adjacent to the U.S./Canada border. Dkt.
7 #99 at ¶ 4 (filed under seal). The house and its driveway are accessed by a one-lane private
8 dirt road that connects to a paved public street. *Id.* at ¶ 5. Plaintiff and Defendant appear to
9 agree that this property is in an area known for cross-border smuggling of people, drugs,
10 illicit money and items of significance to criminal organizations. *Id.* at ¶ 7 and Dkt. #108 at
11 ¶ 10. In addition to living in the home, Plaintiff operates a bed and breakfast, which is
12 known as the Smuggler’s Inn. Dkts. #99 at ¶ 4 and #108 at ¶ 6.

15 Plaintiff has posted a sign at the intersection of the private dirt lane that leads to his
16 home and the paved public street that reads:

18 Welcome to Smuggler’s Inn
19 Guests Only
20 Private Property
21 No Trespassing

22 Dkt. #99 at ¶ 16 and Ex. 5 thereto. There is conflicting evidence in the record as to when
23 that sign was posted. Defendant Egbert asserts that the sign was not posted as of March 20,
24 2014. Dkts. #130 at ¶ 23 and #133 at ¶ 23 (filed under seal). A friend of Plaintiff’s states
25 that the sign has been posted for the last six or seven years. Dkt. #148 at ¶ 11.
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29 In addition, the Court notes that a number of documents in this matter have been filed under
30 seal, with redacted versions available publicly. To the extent possible, the Court will
reference only information available in the public documents.

1 On March 20, 2014, Defendant Egbert drove down the dirt lane into Plaintiff's
2 driveway. Dkts. #108 at ¶ 29 and #130 at ¶ 24. A photo of Plaintiff's property depicts the
3 drive way immediately adjacent to Plaintiff's home, surrounded on to sides by a tall
4 wooden fence. Dkts. #98, Ex. 4 and #108, Ex. A. Earlier that day, Defendant Egbert had
5 learned through conversation with Plaintiff of a guest arriving from Turkey who had
6 booked a room at Smuggler's Inn for that evening. Dkt. #130 at ¶ 30. Plaintiff informed
7 Agent Egbert that the guest had arrived in New York via air from Turkey the night before,
8 and had then flown to SEA-TAC airport that day. Dkts. #94 at 4-5 and #99 at ¶ 10. Two
9 persons employed by Plaintiff had driven to SEA-TAC airport in one of Plaintiff's vehicles
10 to pick up the guest and transport him to Smugglers Inn. Dkt. #99 at ¶ 10. As the vehicle
11 returned, driving down the lane and coming to a stop in the Plaintiff's driveway, Defendant
12 Egbert followed in his Border Patrol vehicle, entering Plaintiff's driveway and parking
13 immediately behind the vehicle. Dkts. #108 at ¶ 29 and #130 at ¶ 24.

14 The driver exited while the guest remained seated in the vehicle. According to
15 Defendant Egbert, when he approached the vehicle, the driver gave him permission to talk
16 to the guest, Mr. Kaya. Dkts. #108 at ¶ 32 and #130 at ¶ 24. However, Plaintiff, who was
17 on a nearby porch, told Defendant Egbert he was trespassing and asked him to leave his
18 property. Dkts. #99 at ¶ 10 and #108 at ¶ ¶ 33-34. Defendant Egbert was "puzzled" by the
19 behavior. Dkt. #108 at ¶ 35.

20 What happened next is not largely in dispute. The parties agree that Agent Egbert
21 did not leave when asked to do so by Plaintiff. Dkt. #108 at ¶ ¶ 33-34. The parties also
22 agree that Plaintiff moved between Defendant and the vehicle in which the passenger was
23 seated. *Id.* Defendant Egbert states that he informed Plaintiff he (Egbert) wanted to speak
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1 with the guest about his immigration status. *Id.* at ¶ 34. The parties dispute what level of
2 force, if any, was used for Agent Egbert to access the vehicle, but the parties agree that
3 Agent Egbert opened the vehicle door and asked the guest about his status in the country.
4 *Id.* at ¶ ¶ 37-38. The parties agree that Defendant Egbert confirmed that the guest was
5 legally in the country and then allowed Plaintiff to escort the guest into his home. *Id.* at ¶ ¶
6 40-41. The instant action followed.
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9 III. DISCUSSION

10 A. Legal Standard on Summary Judgment

11 Summary judgment is appropriate where “the movant shows that there is no genuine
12 dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
13 Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In ruling
14 on summary judgment, a court does not weigh evidence to determine the truth of the matter,
15 but “only determine[s] whether there is a genuine issue for trial.” *Crane v. Conoco, Inc.*, 41
16 F.3d 547, 549 (9th Cir. 1994) (citing *Federal Deposit Ins. Corp. v. O’Melveny & Meyers*,
17 969 F.2d 744, 747 (9th Cir. 1992)). Material facts are those which might affect the
18 outcome of the suit under governing law. *Anderson*, 477 U.S. at 248.
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22 The Court must draw all reasonable inferences in favor of the non-moving party.
23 See *O’Melveny & Meyers*, 969 F.2d at 747, *rev’d on other grounds*, 512 U.S. 79 (1994).
24 However, the nonmoving party must make a “sufficient showing on an essential element of
25 her case with respect to which she has the burden of proof” to survive summary judgment.
26 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Further, “[t]he mere existence of a
27 scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be
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1 evidence on which the jury could reasonably find for the plaintiff.” *Anderson*, 477 U.S. at
2 251.

3 4 **B. Plaintiff’s Fourteenth Amendment and State Law Negligence Claims**

5 As an initial matter, the Court addresses Plaintiff’s federal Fourteenth Amendment
6 claim and state law negligence claim. Defendant Egbert has moved to dismiss the claims
7 on the basis that neither is cognizable against him. Dkt. #107 at 19-20 and 21-23. Plaintiff
8 responded that he agreed those claims should be dismissed. Dkt. #140 at 19. Accordingly,
9 the Court DISMISSES those claims in their entirety.² Because Plaintiff’s Fourth
10 Amendment claim and Defendants’ Anti-SLAPP counterclaim have also been resolved, the
11 only remaining claim at issue is Plaintiff’s federal First Amendment claim, which the Court
12 now addresses.
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15 16 **C. Plaintiff’s First Amendment Claim**

17 Plaintiff alleges in his Amended Complaint that as a result of his complaint to
18 Defendant Egbert’s superiors regarding the incident in his driveway with his guest, Agent
19 Egbert has retaliated against him. Dkt. #22 at ¶ 16. Plaintiff asserts that this retaliation has
20 occurred in the form of intimidation and slander to potential guests causing them to refrain
21 from staying at the bed and breakfast, unsubstantiated complaints to the Internal Revenue
22 Service that Plaintiff had not properly accounted for income received, intentionally parking
23 marked enforcement vehicles near the bed and breakfast for no legitimate purpose in order
24 to discourage business, unjustified complaints to other regulatory agencies, and detaining
25 Mr. Boule’s employees for questioning without legal justification. Dkt. #22 at ¶ 17. As a
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30 ² Plaintiff also agrees that any claim he made for attorney’s fees should also be dismissed.
Dkt. #140 at 19.

1 result, Plaintiff asserts a *Bivens*³ claim against Defendant Egbert on the basis that
2 Defendant's actions violated his First Amendment rights. *Id.* at ¶¶ 18 and 20. Defendant
3 Egbert moves for summary judgment dismissal of this claim on the basis that allowing this
4 claim to proceed would be an unwarranted extension of *Bivens* into a new context. Dkt.
5 #107 at 12. For the reasons discussed below, the Court agrees with Defendant.
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8 In 1971 the United States Supreme Court decided *Bivens*. In that case, the Court
9 held that, even absent statutory authorization, it would enforce a damages remedy to
10 compensate persons injured by federal officers who violated the prohibition against
11 unreasonable search and seizures. *Bivens*, 403 U.S. at 397. The Court acknowledged that
12 the Fourth Amendment does not provide for money damages “in so many words.” *Id.* at
13 396. However, the Court noted that Congress had not foreclosed a damages remedy in
14 “explicit” terms and that no “special factors” suggested that the Judiciary should
15 “hesitat[e]” in the face of congressional silence. *Id.* at 396-97. The Court held that it could
16 authorize a remedy under general principles of federal jurisdiction. *See id.* at 392 (citing
17 *Bell v. Hood*, 327 U.S. 678, 684, 66 S. Ct. 773, 90 L. Ed. 939 (1946)).
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21 Since then, the U.S. Supreme Court has made clear that expanding the *Bivens*
22 remedy is now a “disfavored” judicial activity, in recognition that it has “consistently
23 refused to extend *Bivens* to any new context or new category of defendants.” *Correctional*
24 *Services Corp. v. Malesko*, 534 U. S. 61, 68, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001). The
25 Court has recently set forth the proper test for determining whether a case presents a new
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30 ³ Referring to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

1 *Bivens* context. *Ziglar v. Abbasi*, __ U.S. __, 137 S. Ct. 1843, 1859-60, 198 L. Ed.2d 290
2 (2017).

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4 If the case is different in a meaningful way from previous *Bivens* cases
5 decided by this Court, then the context is new. Without endeavoring to
6 create an exhaustive list of differences that are meaningful enough to
7 make a given context a new one, some examples might prove
8 instructive. A case might differ in a meaningful way because of the
9 rank of the officers involved; the constitutional right at issue; the
10 generality or specificity of the official action; the extent of judicial
11 guidance as to how an officer should respond to the problem or
12 emergency to be confronted; the statutory or other legal mandate under
13 which the officer was operating; the risk of disruptive intrusion by the
14 Judiciary into the functioning of other branches; or the presence of
15 potential special factors that previous *Bivens* cases did not consider.

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17 *Id.* In determining whether a *Bivens* remedy should be recognized in that case, the Court in
18 *Abbasi* compared the respondents' claims to already recognized *Bivens* claims and noted
19 that a new context arises in cases where "even a modest extension" exists. *Id.* at 1864.

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21 The U.S. Supreme Court has only recognized a *Bivens* remedy in the context of the
22 Fourth, Fifth, and Eighth Amendments. *Abbasi*, 137 S.Ct. at 1860 (noting that the Supreme
23 Court has approved three *Bivens* claims in the past: "a claim against FBI agents for
24 handcuffing a man in his own home without a warrant; a claim against a Congressman for
25 firing his female secretary; and a claim against prison officials for failure to treat an
26 inmate's asthma.") (internal citations omitted). Moreover, the Supreme Court has never
27 implied a *Bivens* action under any clause of the First Amendment. *See Reichle v. Howards*,
28 566 U.S. 658 n.4, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (2012) ("We have never held that
29 *Bivens* extends to First Amendment claims."). While the Ninth Circuit previously has
30 authorized *Bivens* claims based on the First Amendment, *see Gibson v. United States*, 781
F.2d 1334 (9th Cir. 1986), *Abbasi* provides that the proper test involves a consideration of

1 *Bivens* cases decided by the Supreme Court, not by the Courts of Appeals. *Abbasi*, 137
2 S.Ct. at 1859. Thus, prior Ninth Circuit decisions are not controlling. Accordingly, the
3 Court finds that Plaintiff’s First Amendment claim clearly presents a new context in *Bivens*.
4 As a result, the Court is required to consider any special factors counseling against
5 extension of *Bivens* into this area, including whether there is any alternative, existing
6 process for protecting Plaintiff’s interests.
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9 Plaintiff argues that special factors support the extension of his claim “because the
10 retaliation and associated harms are directly connected to the Fourth Amendment claims.”
11 Dkt. #140 at 13. However, as the Court previously determined for the reasons set forth by
12 Defendant, Plaintiff’s *Bivens* claims raise significant separation-of-powers concerns by
13 implicating the other branches’ national-security policies. *See* Dkts. #143 at 4-5 and #154
14 at 10-11.
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17 “The Supreme Court has never implied a *Bivens* remedy in a case
18 involving the military, national security, or intelligence.” *Hernandez v.*
19 *Mesa*, 885 F.3d 881, 818–19 (5th Cir. 2018). This Court agrees that the
20 risk of personal liability would cause Border Patrol agents to hesitate
21 and second guess their daily decisions about whether and how to
22 investigate suspicious activities near the border, paralyzing their
23 important border-security mission. *See Abbasi*, 137 S. Ct. at 1861.
24 Likewise, the Court agrees that Congress is in the best position to
25 evaluate the costs and benefits of a new legal remedy, particularly when
26 it has already granted Border Patrol broad authority to secure the
27 international border without providing a damages remedy for claims
28 arising in that context. *See Abbasi*, 137 S. Ct. at 1857–58 and 1862.

29 Dkt. #154 at 10-11. Thus, the Court again finds that Plaintiff attempts an impermissible
30 *Bivens* claim in a new context, and that special factors preclude such a claim. The Court
therefore declines to address Defendant’s alternative qualified immunity argument.

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IV. CONCLUSION

Having reviewed Defendant's motion for summary judgment, the opposition thereto and reply in support thereof, along with the supporting Declarations and Exhibits and the remainder of the record, the Court hereby finds and ORDERS:

1. Defendant Egbert's Motion for Summary Judgment (Dkt. #102) is GRANTED and the remainder of Plaintiff's claims will be dismissed against Defendant Egbert in their entirety.
2. This matter is now CLOSED.

DATED this 24th day of August 2018.



RICARDO S. MARTINEZ
CHIEF UNITED STATES DISTRICT JUDGE